

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES

April 2005

This calendar contains cases that originated in the following counties:

Brown
Dane
Kenosha
Milwaukee
St. Croix
Waukesha

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol:

WEDNESDAY, MARCH 30, 2005 (MADISON)

9:45 a.m.	04-0004	James B. Linden, et. al v. Cascade Stone Company, Inc., et. al
10:45 a.m.	03-1878-CR	State v. Henry G. Wagner
1:30 p.m.	04-3179	Clean Wisconsin, Inc., et. al v. Public Service Commission, et. al

THURSDAY, MARCH 31, 2005 (MADISON)

9:45 a.m.	01-2789 & 02-2979	State v. Ralph D. Armstrong
10:45 a.m.	04-1804-W	John Doe v. Honorable J. Mac Davis
1:30 p.m.	03-2827	Marine Bank, et al v. Taz's Trucking, Inc.

These cases will be heard in the Fond du Lac County Courthouse, Branch 5:

TUESDAY, APRIL 12, 2005 (FOND DU LAC)

9:30 a.m.	03-0561-CR	State v. James M. Moran
11:00 a.m.	03-1416 & 03-1417	John Doe, et al v. Archdiocese of Milwaukee, et. al
2:00 p.m.	03-2180	State v. John R. Maloney

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 30, 2005
9:45 a.m.

04-0004 James B. Linden, et al v. Cascade Stone Company, Inc., et al

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a judgment of the St. Croix County Circuit Court, Judge Scott R. Needham presiding.

In this case, the Wisconsin Supreme Court will decide whether the economic loss doctrine will prevent a couple from suing two subcontractors who allegedly botched the stucco siding and the roof of their new home.

The economic loss doctrine says that people who enter into a business arrangement and lose money cannot bring tort lawsuits against one another to recover the money. Torts are reserved for wrong acts or omissions that result in injuries that are more than economic. Economic losses are remedied instead through enforcement of the terms of the business contract. The Supreme Court recently determined that while the economic loss doctrine bars tort claims in situations involving a product that fails, claims may be pursued in cases where service is negligent. The Court did not, however, determine how a situation involving a contract for products *and* services should be handled. It is expected to do so in this case.

Here is the background: In March 1999, James and Dianne Linden signed a contract with Groveland Craftsman, Inc. for construction of a \$365,000 home in Houlton. Groveland then hired subcontractors. The workmanship was not of the quality the Lindens had expected, and they sued Groveland and two subcontractors, Cascade Stone Company and Allied Construction. Cascade had applied stucco siding and Allied had constructed the roof; both allegedly leaked, resulting in water damage to the home and mold growth that led to health problems for Dianne. The Lindens settled with Groveland and its insurer in March 2003.

In the circuit court, the judge determined that the Lindens' claim against the two subcontractors was barred by the economic loss doctrine. The judge granted summary judgment in favor of the subcontractors and the Lindens appealed.

The Court of Appeals affirmed the circuit court after determining (1) that the appropriate contract to examine was not the one for the subcontracting work (which was a verbal contract between the subcontractors and Groveland) but rather the one between the Lindens and Groveland for the house, and (2) that the predominant purpose of the contract was not to provide a service, but to provide a product – a house – and therefore the economic loss doctrine applied.

Now the Lindens have come to the Supreme Court, which will determine whether the couple was properly barred from suing the subcontractors for negligence.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 30, 2005
10:45 a.m.

03-1878-CR State v. Henry G. Wagner

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a judgment of the Milwaukee County Circuit Court, Judge Richard J. Sankovitz presiding.

This case involves a man who, in answering a series of standard medical questions while being booked into jail, revealed that he used heroin. This admission ultimately was used against him in court. The issue before the Supreme Court is whether this type of interrogation is an acceptable part of the booking process, or whether police must advise an arrestee of his/her Miranda rights before collecting information that could be used in a prosecution.

Here is the background: This case began with a routine traffic stop. West Allis Police Officer Brian Saftig pulled over Henry G. Wagner for speeding and discovered an outstanding warrant. He arrested Wagner and brought him to the West Allis Police Station for booking. The booking process involves removing all property except clothing from the arrestee, itemizing that property, taking a mug shot and fingerprints, and going through a medical questionnaire that asks, among other things, whether the person is sick/injured, on prescription medication or a special diet, currently under the care of a doctor, abusing alcohol or drugs, or suicidal.

In answering these questions, Wagner admitted that he was a drug addict and that he had an expensive heroin habit. Saftig observed track marks on his arms and noted this on the intake questionnaire. At the conclusion of the booking process, Saftig read Wagner his Miranda rights.

The following day, a bakery clerk selected Wagner out of a photo array as the man who had robbed her at knifepoint about a month earlier. He was charged with armed robbery and the statements that he had made during booking were introduced at trial to help show the motive for the robbery (financing the heroin addiction).

Wagner's lawyer objected to the use of these statements, arguing that they were the product of an illegal police interrogation. The prosecution pointed out that there is an exception to the Miranda rule that says a defendant need not be advised of his/her rights before being asked routine booking questions that are designed simply to elicit harmless responses. The defense countered that the "routine booking exception" to Miranda should not apply in this case because the officer should have known that the questions were likely to elicit incriminating responses. The judge concluded that the statements were admissible. The judge pointed out the difficulty that any police department might have in gathering basic medical information from an inmate if the inmate could choose not to answer the booking questions.

Wagner was convicted and sentenced to 12 years' initial confinement followed by eight years' extended supervision. He appealed, and the Court of Appeals affirmed the conviction.

In the Supreme Court, Wagner renews his argument that the questions about his drug use amounted to a custodial interrogation and he should have been advised of his rights prior to answering those questions. The Court will clarify whether these questions were exempt from the Miranda rule under the "routine booking exception," or whether the officer was required to advise Wagner of his rights.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 30, 2005
1:30 p.m.

04-3179 Clean Wisconsin, Inc., et. al v. Public Service Commission, et. al

This case came to the Wisconsin Supreme Court on a petition to bypass, meaning that the petitioners asked the Supreme Court (and the Court agreed) to take the case directly from the trial court without a hearing before the Court of Appeals. This is an appeal of a decision from Dane County Circuit Court, Judge David T. Flanagan presiding.

This is the high-profile dispute between environmentalists and the state's Public Service Commission (PSC), which approved a plan to build two coal-fired power plants on the shore of Lake Michigan in Oak Creek. The Supreme Court will determine whether the \$2.15 billion project, the largest, most expensive generating plant ever built in Wisconsin, may proceed.

Here is the background: On Feb. 1, 2002, WE Energies applied to the PSC for permission to build these plants. On Nov. 10, 2003, the PSC held hearings on the proposal, considered written materials, and then approved the application, subject to certain conditions. Construction was set to begin on May 1, 2005, and opening was set for May 2009 and May 2010.

Five litigants, including Clean Wisconsin, Inc. (formerly known as Environmental Decade), S.C. Johnson & Son, Inc., Calpine Corporation (a wholesale producer of electrical power), the City of Oak Creek, and the Town of Caledonia filed petitions asking for judicial review of the PSC ruling. They expressed concern about the environmental impact of these plants, the effect on competition, and the cost of pollution abatement in the communities near the plant. The petitions were consolidated and heard in the Dane County Circuit Court. The judge concluded that the PSC was too quick to approve the proposal, pointing out that WE had not been required to take out the necessary permits, study alternative locations for the plant, or consider alternative fuels, as state law requires. He ordered the PSC back to the drawing board.

As noted, the case bypassed the Court of Appeals.

In their filings with the Supreme Court, WE Energies and the PSC express concern about energy supply and cost. They say that delay of this plant might mean that Wisconsin's energy system soon will not be able to meet the demands of the state's residents, and point out that a coal-fired generator plant has not been approved in Wisconsin since 1980, and that Wisconsin's energy demand is expected to grow by the equivalent of one major new power plant every two years. They also point out that the contract for design and construction of the plant requires a green light by July 1, 2005 (a renegotiation from the original May 1, 2005, deadline) or the contract will need to be renegotiated, which, they say, could mean substantially increased costs that would be passed along to consumers.

Johnson and Clean Wisconsin, on the other hand, argue that the delay is WE Energies' own fault for not adequately following the application rules. They also characterize the concerns about energy supply and cost, and about Wisconsin's ability to attract new business without a guarantee against power outages, as overblown. They express concerns about the environmental impact of the project and about the possible dampening effect on efforts to advance renewable energies.

The Supreme Court will decide whether the Oak Creek project will move forward.

WISCONSIN SUPREME COURT
THURSDAY, MARCH 31, 2005
9:45 a.m.

{01-2789

{02-2979 State v. Ralph D. Armstrong

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed an order of the Dane County Circuit Court, Judge Patrick J. Fiedler presiding.

This case involves a man who was convicted of sexual assault and murder in 1981 and who is seeking a new trial based upon DNA evidence. The Supreme Court will decide whether the new evidence requires a reopening of this case.

Here is the background: Charise Kamps was murdered in her Madison apartment on June 24, 1980. Her body was found nude, with a bathrobe tie draped across her back. A pathologist concluded that Kamps most likely had died from strangulation, and also found that she had been beaten with a blunt object. Ralph Armstrong knew Kamps through his fiancée, and acknowledged having been alone in Kamps' apartment with Kamps at some point that night. He quickly became the focus of the police investigation and eventually was arrested and charged with sexual assault and murder.

At Armstrong's trial, one of the State's key witnesses was Riccie Orebja, who lived across the street from Kamps' building and who sat on his front porch from about 10:45 p.m. to 3:55 a.m. He testified that he had spotted a man fitting Armstrong's description and driving a car matching the description of Armstrong's car at about 12:30 a.m., and that the man entered and exited Kamps' building several times. Orebja underwent hypnosis to help him recall the evening's events, and later recanted his identification of Armstrong and then recanted the recantation, testifying at trial that he had seen Armstrong coming and going from Kamps' building that night. The State's case also relied upon semen and hair samples gathered from the scene, and in particular hairs found on the bathrobe tie. At the time, experts testified that the hairs were consistent with Armstrong's hair, and that he could not be eliminated as the semen donor. Finally, investigators said they found blood under Armstrong's fingernails although they could not be certain it belonged to Kamps.

Armstrong was convicted and is currently serving a life sentence at Waupun. Over the last 12 years, he has sought DNA testing of the forensic evidence in the case. It has now been established that (1) the semen was not his and did not come from Kamps' fiancé, (2) the hairs on the belt were not his, not Kamps', and did not come from Kamps' fiancé, and (3) the substance scraped from beneath his fingernails was not blood. In 1993, after the DNA test on the semen, he unsuccessfully sought a new trial. Now, with additional DNA evidence, he is again seeking a new trial – so far, without success.

The circuit court that heard his motion applied the “newly discovered evidence” test, which requires a defendant seeking a new trial to establish through clear and convincing evidence a reasonable probability that a different result would be reached. The judge concluded that Armstrong had not met this burden. Armstrong appealed, and the Court of Appeals affirmed the circuit court, although with some reservations.

The Supreme Court will decide whether Armstrong will receive a new trial.

WISCONSIN SUPREME COURT
THURSDAY, MARCH 31, 2005
10:45 a.m.

04-1804-W John Doe v. Hon. J. Mac Davis

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Waukesha County Circuit Court, Judge J. Mac Davis presiding.

This case stems from a ‘John Doe’ investigation in Waukesha. The Supreme Court will decide whether a judge presiding in a John Doe case has the authority to require lawyers who are representing witnesses in the proceeding to take a secrecy oath, and what recourse the judge may have if the lawyers refuse to take this oath.

A John Doe is a proceeding normally held at the request of a district attorney who has information about a possible crime and wishes to question people about it under oath. This is a way for a district attorney to obtain testimony from a witness who refuses to give evidence without first receiving a grant of immunity from a judge. When a witness in the John Doe case declines to answer a question based on his or her right against self-incrimination, the district attorney can request an order from the judge requiring that the witness give the testimony or face a possible jail sentence. Such compelled testimony may not be used in a later proceeding against that witness, though it is available for use in any later proceedings against others. A criminal complaint charging a real person often is issued at the end of a John Doe investigation.

This case involves one witness who, according to paperwork filed with the Supreme Court, was subpoenaed to testify at a John Doe proceeding in Waukesha County before Judge J. Mac Davis. The judge instructed everyone involved about the secrecy of the proceeding and then required the witness to swear to and sign an oath of secrecy. He also asked the witness’s two lawyers to sign the oath, but they refused, indicating that their verbal agreement to maintain the secrecy of the proceeding should be satisfactory. The judge disagreed and disqualified them from the case.

The witness’s participation in the John Doe was stayed (stopped) so that the two lawyers could appeal their disqualification. They asked the Court of Appeals to order Davis to reinstate them, arguing that their client had been placed in a bind by the judge’s removal of the client’s chosen counsel, and maintaining that state law does not grant judges the power to require a secrecy oath from people who are not giving testimony at a John Doe. The judge responded that he had inherent authority to maintain the secrecy of the proceeding as he saw fit, and pointed to caselaw that has upheld the authority of John Doe judges in other matters. The Court of Appeals ultimately concluded that this question was sufficiently important to warrant the immediate attention of the Supreme Court, and it certified the case.

The Supreme Court will determine whether a John Doe judge has the authority to order attorneys to take secrecy oaths.

WISCONSIN SUPREME COURT
THURSDAY, MARCH 31, 2005
1:30 p.m.

03-2827 Marine Bank, et al v. Taz's Trucking, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an order of the Kenosha County Circuit Court, Judge Michael Fisher presiding.

This case involves a question of who pays the freight charges when a company hires a trucker to deliver its goods to various customers.

Here is the background: In spring 2002, Modern Building Materials, Inc. (MBM) hired Taz's Trucking to haul its goods to MBM customers. The two companies entered into an agreement on the rates to be charged for shipping, but did not ever set out whether MBM or MBM's customers would be paying those charges.

In spite of the lack of a written agreement, Taz collected directly from MBM for about three months. Taz then factored the account, meaning that it contracted with a financing corporation and sent the invoices directly to this enterprise, which paid Taz a percentage up front, then collected from MBM and paid Taz the remainder, minus a handling fee. Because of this system, Taz did not discover until November 2002 that MBM was not paying its bills. Taz contacted MBM at that point, and indicated that if MBM did not pay, it would seek payment from MBM's customers. A Taz executive called customers and urged them to pay Taz directly.

MBM was in receivership (a form of bankruptcy in which the debtor can avoid liquidation by reorganizing with help from a court-appointed trustee) during its relationship with Taz Trucking. Soon after Taz indicated it would start trying to collect directly from MBM's customers, Marine Bank – the company's secured creditor – took Taz to court seeking to prohibit it from collecting the unpaid freight charges from MBM's customers. The circuit court entered this order, based upon the initial pattern in the MBM-Taz relationship that implied an agreement that payments were to come through MBM.

Taz appealed this ruling, and the Court of Appeals affirmed the circuit court, concluding that the common-law presumption that a trucking company may look to a client's customers for payment if the client is delinquent does not hold up in a case where the implied agreement was for the client to pay the shipping bills.

Now, Taz has come to the Supreme Court, which will decide whether it will be able to pursue payment from the customers to whom it delivered MBM's goods.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 12, 2005
9:30 a.m.

03-0561-CR State v. James M. Moran

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed an order of the Dane County Circuit Court, Judge David T. Flanagan presiding.

This case involves two men, one woman, and a fight that led to a stabbing. It presents the Supreme Court with its first opportunity to interpret and apply a statute that the Legislature enacted in 2001 to give prisoners access to DNA testing. While many states have enacted such laws, Wisconsin's version is considered cutting-edge because it not only permits motions for post-conviction DNA testing in cases where the prisoner is alleging mistaken identity, but also allows such motions in cases where the prisoner claims to be innocent but pleaded guilty, and in cases where the DNA evidence might shed new light on a crime in a way that might not change the verdict, but could have an effect on the length of the prison sentence -- for example, if the evidence bolstered the prisoner's claim of self-defense, as the defendant in this case is hoping.

Here is the background: James Moran owned an exotic pet store on State Street in Madison. He met Corrine Pinchard there and they began dating. Jacob Jensen took a job at the pet store and he became romantically involved with Pinchard. At about 1 a.m. on June 17, 1994, Moran went to the Madison apartment building where Pinchard lived, found Pinchard and Jensen there, and stabbed them both. He then stole a car and drove to La Crosse, where he turned himself in. He was charged with two counts of attempted first-degree homicide, two counts of first-degree reckless injury, and auto theft. He pleaded guilty to the reckless injury of Pinchard and to stealing the car, and represented himself at a trial in February 1995 on the other charges.

At trial, Moran maintained that Jensen was jealous of his relationship with Pinchard and that, when he (Moran) showed up at the building looking for a friend who had agreed to meet him earlier at a bar but had not shown up, Jensen attacked him with a brick in the building's hallway. Moran claimed that he was acting in self-defense when he stabbed Jensen and that Pinchard's nine stab wounds occurred as a result of her moving between the two men to try to break up the fight.

The prosecutor told a much different story, painting Moran as jealous and suicidal and claiming that Jensen and Pinchard were afraid that Moran would show up, and were trying to secure the building's outer door to keep him out when he confronted them. The jury convicted Moran on all counts. He is now serving a 72-year prison sentence.

Moran filed a motion seeking post-conviction DNA testing. Both the circuit court and the Court of Appeals denied the motion. He continues to seek access to DNA testing on this appeal to the Supreme Court. Specifically, Moran is focusing on several of the blood samples taken from certain areas of the crime scene that had yielded inconclusive results in initial crime lab testing (all three people had the same blood type). He hopes to demonstrate that the blood is Jensen's, which might support his (Moran's) version of where the struggle took place, lending credence to his self-defense claim and casting doubt upon Jensen's story. The Supreme Court will decide whether Moran will be allowed to pursue DNA testing of these blood samples.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 12, 2005
11:00 a.m.

{03-1416

{03-1417 John Doe, et al v. Archdiocese of Milwaukee, et al

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed an order of the Milwaukee County Circuit Court, Judge Michael Guolee presiding.

This case involves allegations of child molestation against a now-deceased Catholic priest. The questions before the Supreme Court are whether the actions of the Milwaukee Archdiocese in this case are open to review by the courts or whether such a review would result in excessive government entanglement in religion, contrary to the First Amendment of the U.S. Constitution ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .") The Court also will determine whether the statute of limitations – the period allowed for filing lawsuits – should be extended in cases involving alleged abuse by clergy.

Here is the background: In 2002, multiple plaintiffs filed claims in Milwaukee County Circuit Court alleging negligence, breach of fiduciary duty, and fraud on the part of the Milwaukee Archdiocese. The plaintiffs alleged that Father George Nuedling, a Roman Catholic priest who served as pastor at St. John the Evangelist in Twin Lakes and who died in 1994, had sexually abused them in the 1960s and '70s, when they were between the ages of 9 and 14. The Milwaukee County Circuit Court dismissed the claims after concluding they were barred by the statute of limitations, which required legal action shortly after the plaintiffs' 18th birthdays.

The plaintiffs appealed, arguing that they were slow to recognize the harm because of their reverence and fear of the church. Although the injuries may have occurred 40 years ago, the plaintiffs argued, the clock should not have started ticking until they discovered their injuries. The Court of Appeals indicated that it was bound by past decisions of the Wisconsin Supreme Court that required dismissal of the claims.

In these past cases, the state Supreme Court concluded that the First Amendment prohibits claims against a religious entity for negligent hiring, retention, and supervision, because such claims would require the government (through the courts) to set a standard for these activities, which in turn would require interpretation of church canons and internal church policies. In dismissing the plaintiffs' lawsuits in this current case, the Court of Appeals followed the caselaw set in these past decisions, although they commented that, "Were we writing on a clean slate, we might very well agree with appellants that they are entitled to an attempt to prove their contentions."

In the Supreme Court, the plaintiff (there is one remaining plaintiff, John Doe #67F; the others have voluntarily dismissed their claims) argues that the Catholic Church enjoys an immunity from liability "that is unacceptable in a democratic society." The Archdiocese, on the other hand, maintains that the lower courts decided these cases correctly.

The Supreme Court will decide whether John Doe #67F may proceed with his lawsuit against the Milwaukee Archdiocese.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 12, 2005
2:00 p.m.

03-2180 State v. John R. Maloney

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an order of the Brown County Circuit Court, Judge Peter Naze presiding.

This case stems from the February 1998 death of Sandra Maloney and the subsequent murder conviction of her estranged husband, Green Bay Police Officer John R. Maloney. The Supreme Court will review the actions of the man who prosecuted the case – former Winnebago County District Attorney Joe Paulus, who now is serving a federal prison sentence for taking bribes in 22 cases between 1998 and 2000 – to decide whether Paulus violated the lawyers’ code of ethics in his investigation and, if so, whether the evidence obtained as a result of that violation should have been suppressed. The Court also will examine Maloney’s allegation that his defense team, Attorneys Gerald Boyle and Bridget Boyle-Saxton, were ineffective at his trial.

Here is the background: On Feb. 11, 1998, Sandra Maloney’s mother entered Sandra’s home and discovered her badly burned body. Fire investigators initially concluded that she had died as a result of the fire, and that the fire had been accidental; the autopsy, however, revealed signs of strangulation, and John Maloney became the prime suspect.

During the investigation, Maloney’s girlfriend, Tracy Hellenbrand, a former criminal investigator, agreed to wear a wire that allowed for the secret video- and audio-taping of her conversations with Maloney. At Maloney’s trial, Paulus – who served as a special prosecutor because the Brown County District Attorney’s Office had worked with Maloney in his role as a police officer – showed the jury several hours of videotape and called Hellenbrand to the witness stand to testify that Maloney had confessed the murder to her. Boyle built Maloney’s defense around the theory that Hellenbrand had killed Sandra Maloney. The jury convicted Maloney and he appealed.

In the Court of Appeals, Maloney argued that Boyle had provided an inadequate defense by failing to object to the videotapes on the grounds that Paulus, in directing Hellenbrand’s participation in the secret videotaping, violated the Rules of Professional Conduct for Attorneys, which state, in part:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so.

The Court of Appeals concluded that there had been no ethics violation and that, even if there had, suppression of evidence would not be the remedy for this type of violation. The Court of Appeals further found that Boyle’s defense of Maloney, while ultimately unsuccessful, was not ineffective.

In the Supreme Court, Maloney renews his argument that Paulus “egregiously violated his ethical constraints in obtaining evidence” and that the videotapes should be suppressed. He further argues that Boyle, in repeatedly asking the State’s lead investigator at trial whether he

thought Maloney was lying, and repeatedly receiving affirmative responses, did him undue harm.

The Supreme Court will decide whether Maloney will receive a new trial.